For England, Nothing Changed

I have been involved in the law of Scotland in various capacities - student, practising advocate, law reformer, law teacher, encyclopaedia editor, part-time sheriff - for 60 years. For more than 59 of those years I have believed implicitly and I have encouraged others to believe that, as a result of the Treaty of Union and the Acts of the Scottish and English Parliaments that followed, both Scotland and England ceased to exist as states in international law and were replaced by a new state, the United Kingdom of Great Britain.

This is the doctrine sanctified by Professor A V Dicey, the patron saint of English constitutional lawyers[1]. Following him, a leading English authority on international law, Lord (A D) McNair wrote[2] in 1938: 'England and Scotland ceased to exist as international persons and become the unitary State of Great Britain.' Professor T B Smith of Edinburgh University, a Scottish legal nationalist if ever there was one, concurred[3] in 1957: 'The separate kingdoms of Scotland and England merged in the new State of Great Britain, and ceased to exist as persons for purposes of public international law'. Professor D M Walker, his counterpart at Glasgow University took the same view[4] – one of the few things that Smith and Walker ever agreed about.

I am now convinced that this explanation of what happened in 1707 is false. The events of 1707 certainly resulted in Scotland's Parliament and executive government ceasing to exist. But was there any parallel in England? And were the governmental institutions of both nations replaced by the institutions of a new state?

The answer to these questions is no.

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[1]Dicey AV, Thoughts on the union between England & Scotland (1920) with Robert S Rait.
[2] McNair AD, The Law of Treaties: British Practice and Opinions (1938) 40
[3]Smith TB, The Union of 1707 as fundamental law (1957) Public Law 99, 99
[4]Walker DM, Some Characteristics of Scots Law (1955) 18 Modern Law Review 321, 322.

The Legislative Branch of Government

Both houses of the English Parliament remained in being, exactly as before, save for the addition to the House of Commons of 45 Scottish members and to the House of Lords of 16 holders of Scottish peerages. The incumbent officers and members representing England of course comprised the overwhelming majority of the allegedly new body. All of the traditions, procedures, and standing orders of the English parliament were retained, although there is no provision for this within the treaty. It was not even considered necessary to hold a general election or for the Commons to select a new Speaker. For England, nothing changed. The Speaker in question was, of course, John Smith, MP for Andover, who is perhaps best remembered for saying[5] "We have catch'd Scotland and will bind her fast."

The numbering (by regnal year and chapter number in *The Statutes of the Realm*) of the legislation passed by the Parliament continued in an unbroken series before and after the addition of the Scottish members. Thus, the Act of the English Parliament ratifying the Treaty of Union was 6 Anne c11; the last Act passed by it before the new dispensation took effect on 1 May 1707 was 6 Anne c34 (An Act for continuing the laws relating to the poor, and to the buying and selling of cattle in Smithfield and for suppressing of piracy); and the first Act passed after the addition of Scottish members was numbered 6 Anne c35 (Land Tax Act). For England, nothing changed. Incidentally,the second Act passed, 6 Anne c36, which received the Royal Assent on the same day, was An Act to Repeal Certain Scotch Acts (namely the Scottish Parliament's Act for the Security of the Kingdom and its Act anent Peace and War.

[5]https://endtheunion.scot/we-have-catchd-scotland/

The Executive Branch of Government

In 1707 the executive branch of government in Scotland (including but not limited to the Privy Council) was superseded[6] by the existing executive structure pertaining in England (including its Privy Council), with the addition of a Secretary of State for Scotland, an office that was abolished in 1746, Scotland thereafter being "managed" by the Lord Advocate until 1827 and then by the Home Office until the office of Secretary for Scotland was created in 1885, upgraded to Secretary of State for Scotland in 1926. The institutions of executive government in England changed not at all after and in consequence of the events of 1707. For England, nothing changed.

One of the functions of the executive branch of government is the conclusion of treaties and agreements with foreign states. Prior to 1707 both Scotland and England did this. None of Scotland's pre-1707 treaties (including with France, with the Pope and with various Scandinavian states) was regarded by the new regime and by legal scholars as still valid and binding after 1 May 1707. By contrast England's pre-1707 treaties were regarded by the new regime and by legal scholars as continuing in full force and effect notwithstanding the supposed creation of the new United Kingdom of Great Britain[7] (including England's Treaties of Alliance with Portugal, concluded in 1373 and 1386). And England's diplomatic representation in Europe continued uninterrupted. Fresh credentials on behalf of the monarch of the supposed new state of Great Britain were not presented to nor, indeed, expected by the foreign states to which the diplomatic representatives had been accredited. For England, nothing changed.

The Judicial Branch of Government

[6]https://en.wikipedia.org/wiki/Scottish_devolution#:~:text=History-,1707%20to%201999,State%20for%20the%20Home%20Department.
[7]Crawford J & Boyle A, Opinion for UK Government (2012) para 35.2. https://www.pure.ed.ac.uk/ws/portalfiles/portal/14540285/Boyle_A_Annex_A_Opinion.pdf

As far as the judicial branch of government is concerned, for England, nothing changed. At first sight it would appear from the texts of the Treaty and Acts of Union that equally for Scotland, nothing changed. Article 19 provides[8]:

'That the Court of Session, or College of Justice, do, after the Union, and notwithstanding thereof, remain, in all time coming, within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Privileges, as before the Union, subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great Britain; […]

And that the Court of Justiciary, do also, after the Union, and notwithstanding thereof, remain, in all time coming within Scotland, as it is now constituted by the laws of that Kingdom, and with the same Authority and Privileges as before the Union, subject nevertheless to such Regulations as shall be made by the Parliament of GreatBritain, and without Prejudice of other Rights of Justiciary […]

and that no Causes in Scotland be cognizable by the Courts of Chancery, Queen's Bench, Common-Pleas, or any other Court in Westminster-Hall; and that the said Courts, or any other of the like Nature, after the Union, shall have no Power to cognize, review, or alter the Acts or Sentences of the Judicatures within Scotland, to stop the Execution of the same.'

But in England a right of appeal existed in certain circumstances to the House of Lords, sitting as a court, not a house of the legislature. It, of course, sat not in Westminster Hall like the other English courts, but in the Palace of Westminster.

In Scotland before the union, protestation for remeid of law could be taken from the Court of Session to the Scots Parliament. The Articles of Union did not explicitly provide for appeals from the Scottish courts, but nor did they explicitly prohibit them, and dissatisfied litigants, claiming to exercise the privilege asserted in the Claim of Right to protest for remeid of law against decisions of the Lords of Council and Session, took appeals to the upper house of the Westminster parliament, where the House of Lords welcomed them with open arms. The court at the apex of the English judicial system was

[8]https://www.parliament.uk/globalassets/documents/heritage/articlesofunion.pdf

thereby enabled to “correct” decisions delivered by the supreme civil court in Scotland.

So it was that from 1707 the ultimate court of appeal in civil matters in Scotland became the House of Lords. Sitting as a court it was normally staffed by the Lord Chancellor and any other peer who held or had held high judicial office. Very often the Lord Chancellor sat alone.

Between 1707 and 1867 the final court of appeal from Scottish civil courts contained not one single judge trained or qualified in the law of Scotland. Lord Erskine who had been Lord Chancellor in 1806-1807 - a good Scottish name but a lawyer trained and qualified only in England - said in a debate in the Chamber in 1823[9] that “he knew something of the law; but of Scotch law he was as ignorant as a native of Mexico. And yet he was quite as learned in it as any one of their lordships.”

In 1858 Lord Cranworth in a Scottish appeal in the House of Lords, referring to a doctrine of English law that would have applied had the case come through the English court system, said this[10]: “But if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law as established in England is founded on principles of universal application and not on any peculiarities of English jurisprudence.”

Since 1867 at least one judge from the Scottish system - now normally two - has been appointed to sit in the final court of appeal, originally the House of Lords and now the Supreme Court. But you can perhaps imagine how much damage could be, and was, done between 1707 and 1867. Today, the Supreme Court normally sits as a bench of five; and so, even if both Scots sit

[9]https://hansard.parliament.uk/lords/1823-06-30/debates/3e27ec6e-c601-4e1d-836a-4eacbdad2ac6/AppellateJurisdiction
[10]Bartonshill Coal Co v Reid https://www.casemine.com/judgement/uk/5a8ff8dd60d03e7f57eceb11

in a Scottish appeal, they are necessarily outnumbered by judges trained and qualified in a different system.

So although on the face of the Articles of Union it appeared as if the independence of the Scottish judicial system was preserved intact, in reality and in actual practice it was subordinated to the highest English appeal court. But in England, nothing changed.

The Crawford-Boyle Opinion

In 2012, in anticipation of the forthcoming referendum on independence, the UK government commissioned an opinion[11] from two very distinguished international lawyers, Cambridge Professor James Crawford SC (Australia) and Edinburgh University Professor Alan Boyle (both also members of English barristers chambers). The purpose of the opinion was to advise, in the event of Scotland becoming an independent state in international law, whether there would be a state successor to the United Kingdom, succeeding seamlessly to the United Kingdom's rights and obligations under international law and, if so, whether that successor would be rump-UK (ie England) alone or England **and** the newly independent state of Scotland. Crawford and Boyle came to the conclusion (in 184 paragraphs spread over 45 pages) that there would be a successor state and that state would be England alone. Scotland would be a new state and would not succeed to any of the rights of, or obligations undertaken by, the previous United Kingdom. En route to reaching this conclusion the professors considered the legal nature of what happened in 1707. In paras 34 and 35 they wrote:

"One view is that the union created a new state, Great Britain, into which the international identities of Scotland and England merged and which was distinct from both. [...] An alternative view is that as a matter of international law England continued, albeit under a new

[11] https://www.pure.ed.ac.uk/ws/portalfiles/portal/14540285/Boyle_A_Annex_A_Opinion.pdf

name and regardless of the position in domestic law, and was simply enlarged to incorporate Scotland."

It is perfectly clear from the examples that they give of the continuation unchanged of English institutions that Crawford and Boyle favoured the "England enlarged" alternative. However, in para 37 they stated:

"For the purpose of this advice, it is not necessary to decide between these two views of the union of 1707. Whether or not England was also extinguished by the union, Scotland certainly was extinguished as a matter of international law, by merger either into an enlarged and renamed England or into an entirely new state."

An analogy

When lawyers are confronted with situations in which there appears to be no direct legal precedent, guidance as to what the correct answer may be is often sought in analogies. What situations are there that can realistically be regarded as analogous to what took place between England and Scotland in 1707?

The analogy that most easily springs to mind is the law relating to mergers and takeovers of business organisations[12]. A **merger** is typically a mutual agreement where two companies of relatively similar size and strength decide to combine their operations to form a new, single entity. It is often seen as a partnership or a joining of equals. A **takeover** involves one company (the acquirer) gaining control of another company (the target). In a takeover, the target company becomes a subsidiary of the acquirer or is completely absorbed into the acquirer's operations. The acquirer has the controlling power and makes the key decisions. Takeovers can be friendly (with the target company's board and shareholders agreeing to the

[12]https://lawhive.co.uk/knowledge-hub/corporate/whats-the-difference-between-mergers-and-takeovers/

acquisition) or hostile (where the acquirer attempts to gain control despite the target company's resistance).
In company law there are well recognised tests for determining whether what has happened is a merger or a takeover. I have no doubt that any corporate lawyer looking at the events of 1706, 1707 and later would classify what occurred as a takeover, not a merger. Whether the takeover would then be properly classified as friendly or hostile, is a question on which opinions may differ and which I gladly avoid..

Conclusion

No conscientious and impartial lawyer can look at what happened in the first decade of the 18th century to the institutions of government north and south of the Tweed and reach the conclusion that the pre-existing states of Scotland and England both ceased to exist and that a new state emerged phoenix-like out of the ashes. The evidence - the facts on the ground - support no judgment other than that Scotland ceased to exist as a state in international law and was absorbed into a still extant England, cosmetically renamed Great Britain.

Scotland’s legal status today, more than three centuries later, is consequently not that of a partner in a union - unequal perhaps, but a union nonetheless. Its status is that of a territory absorbed into a larger country - a territory with only limited self-government and with its resources exploitable and exploited by the larger country for its own benefit and purposes.

What consequences can and should flow from the recognition and acceptance of Scotland’s true legal status as a non-selfgoverning territory is for others to say.

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